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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 748

JOHN L. VEST,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF THE TAYLOR NATIONAL BANK, CAMPBELLSVILLE, KENTUCKY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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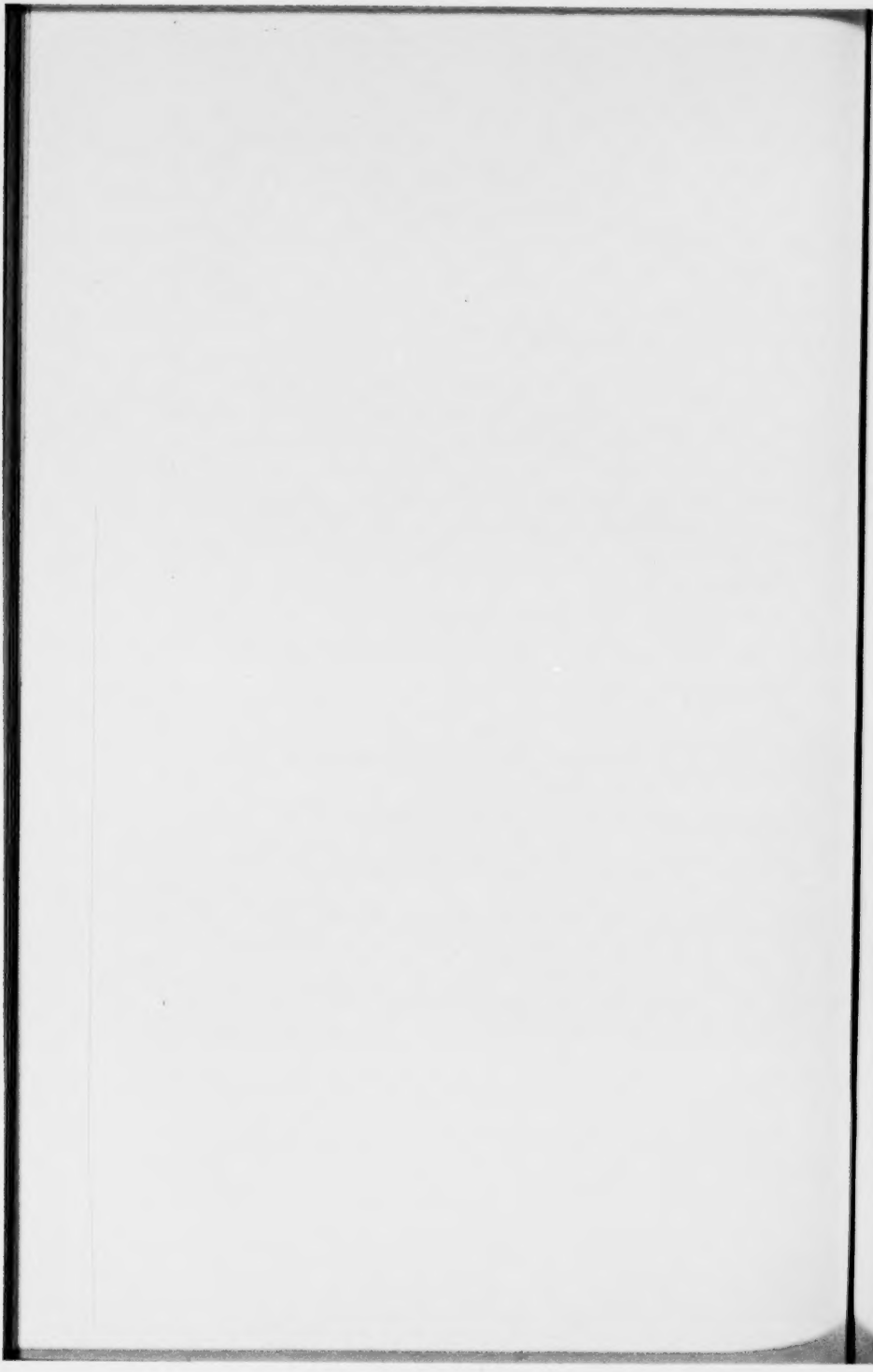

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FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF THE TAYLOR NATIONAL BANK, CAMPBELLSVILLE, KENTUCKY,

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BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the District Court of the United States for the Eastern District of Kentucky, Covington Division (T. 147-151), is reported in 28 Fed. Supp. 507. The opinion of the Circuit Court of Appeals for the Sixth Circuit (T. 166-173) was originally reported in 119 F. (2d) 834 (Advance sheets), was withdrawn by order of the court before the permanent bound volume was published, and has been republished in 122 F. (2d) 765 (Advance sheets).

Jurisdiction.

The decree of the United States Circuit Court of Appeals for the Sixth Circuit was entered on May 14, 1941 (T. 165). A petition for rehearing was denied on October

10, 1941 (T. 221). The petition for a writ of certiorari was filed November 15, 1941, and a copy thereof served on respondent on November 18, 1941.

The petition for a writ of certiorari does not contain a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction,[1] but it is stated at page 10 of the brief in support of the petition that the jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 347).

Questions Presented.

Neither the petition for a writ of certiorari [1] nor the brief in support thereof [2] contain a statement of the questions presented. The record clearly establishes and petitioner conceded in his petition for rehearing filed below (T. 181) as well as argues in his petition for writ of certiorari, pp. 11-13, that the original note was his legal and binding obligation. The real questions which petitioner presents, as we conceive them, are:

(1) Has petitioner met the burden of proving the alleged conditions and limitations of Morton's authority as petitioner's agent with respect to the maintenance of collateral having sufficient value to pay petitioner's note?

(2) Has petitioner met the burden of proving that Morton breached or violated his alleged duty as such agent?

Statutes Involved.

The essential portions of statutes involved are set forth in the petition for writ of certiorari, page 6.

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[1] As required by Rule 38 (2) of this Court.

[2] The supporting brief is not a part of the petition for this purpose. See *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 178.

Statement of Matter Involved.

The respondent, Federal Deposit Insurance Corporation, as Receiver of the Taylor National Bank of Campbellsville, Kentucky (hereinafter called the bank), brought suit in the Federal court against petitioner and others (T. 1-5). For the purposes here involved respondent's bill in equity sought judgment against petitioner for $10,000 (T. 4) plus interest due (T. 4, 30-1) on a promissory note dated January 12, 1937 (T. 2, 6). Petitioner answered, admitting that he executed the note (T. 11) but asserted by way of affirmative defenses that the bank was a "one-man" institution with one Morton completely in domination of its management and affairs (T. 13) and that since Morton was the sole actor in the transactions here under consideration (T. 13),

I. knowledge of Morton's representations that he was the owner of certain securities of the then market value of about $12,000, which he would furnish and pledge as collateral to petitioner's note (T. 14), was imputed to the bank; and

II. that the bank took the notes subject to (a) Morton's promise that the bank would never require or request petitioner to pay any part of the note (T. 15), (b) Morton's promise (which petitioner alleges to have been later breached) to maintain at all times thereafter collateral to the extent of at least $12,000 market value and to increase the margin of collateral if criticized by national bank examiners (T. 14, 15), (c) the limitation and condition imposed by petitioner upon Morton's authority (which petitioner alleges the latter violated) to deliver the note here involved only upon simultaneously pledging securities of the then market value of at least $12,000 (T. 18-20).

The case was tried on May 5, 1938 (T. 36), the District Court holding that recovery on the note here involved was

precluded because the evidence disclosed "a br[ach of the contract pursuant to which the note was exe[uted" and that notice thereof was imputed to the bank (T[150-1).

In ordering judgment for petitioner, the [rial court found that the bank was a "one-man" bank (T[158); that on January 24, 1935, petitioner signed a blank n[te in favor of the bank as well as a $10,000 check drawn o[the bank payable to Morton's designee (T. 155) after [orton had represented to petitioner that he was the owner [of certain specifically described securities having the th[n market value of around $12,000 (T. 154), and had pro[ised that he would pledge those securities as collateral to [etitioner's note; that he would pledge additional collateral [criticism were made by bank examiners; that he would [ay the interest on the note and that he would pay the f[ll amount thereof with the proceeds of the sale of the colla[eral when it would reach a satisfactory price (T. 154). The court also found that Morton filled out the note for $[0,000 and placed it, together with the collateral described [n his conversation with petitioner, among the assets of [the Bank, the proceeds being credited to petitioner and [is $10,000 check charged to the credit so created (T. 155). The trial court further found that petitioner, at Morton[s request, executed five renewals of the note, each of which [was signed by petitioner in blank and delivered to Morton, [who later filled in the body of the notes with proper dates a[d amounts as well as correct descriptions of the collateral [urporting to be pledged as security to each respective note (T. 155-6). Collateral described in the last renewal note (be[ng the one on which this suit was brought) was found in th[collateral files of the bank when it closed (T. 157), altho[gh it was worth only $2,443.00 (T. 158) and was adjudica[ed by the trial court to be the property of certain truste[s who had placed it with the bank for safekeeping (T. 157)

The trial court made no findings and the record is devoid of any proof with respect to the following vital elements of defenses (even assuming that they would be availing here) interposed by petitioner, viz:

(1) that Morton was not the owner of the collateral which petitioner testified described by the former in his January 24, 1935, conversation with petitioner;

(2) that Morton or anyone else promised petitioner that the bank would never require or request him to pay the note;

(3) that Morton promised to maintain at all times after January 24, 1935, collateral of the value of $12,000 or more to secure petitioner's note;

(4) that national bank examiners ever criticized petitioner's note from the standpoint of inadequacy of collateral; nor

(5) that the authority conferred by petitioner upon Morton to deliver the renewal note here involved was conditioned upon Morton's simultaneous delivery to the bank of collateral having a value of at least $12,000.

On the contrary, the trial court found that the collateral described by Morton in his conversation of January 24, 1935, was pledged to secure the original note signed by petitioner (T. 155) and that while petitioner was not actually aware of the removal of any of the original collateral (T. 157), yet "he was aware that Morton had reserved the right to change the collateral from time to time—" (T. 157).

On appeal the Circuit Court of Appeals reversed, holding that public policy prohibited petitioner from defending on the ground that there was an agreement by Morton which would nullify petitioner's original and renewal notes (T. 169). The appellate court also rejected as immaterial,

petitioner's alleged defense "that Morton *in the early stages* undertook to indemnify appellee by the pledge of collateral—" (T. 170). (Italics supplied.)

Argument.

The Circuit Court of Appeals Held that Defense was Illegal—Not the Cause of Action.

The gist of the argument under petitioner's first point is that the original note was his legal, valid and binding obligation. Respondent understands and interprets the decision of the Circuit Court of Appeals to hold precisely as petitioner contends on this question. As petitioner states at page 3 of his petition it was the defense set up by petitioner, not the note itself, which the court held to be invalid, as against public policy, when it said:

> "The defense, as averred in the answer to the bill, and as set out in the proof,—that by virtue of an agreement between Morton and appellee, the original note and its various renewals were nullities—must fail" (R. 169).

relying on the doctrine laid down by this Court in *Deitrick* v. *Greaney,* 309 U. S. 190.

The Proof Does Not Make Out a Case for the Application of the "Sole Actor" Doctrine.

Under the second point of his argument petitioner contends that this case comes within the "sole actor" rule and that he should be absolved from liability. Assuming for the present purposes that the bank was a "one man" bank, and that Morton was the sole actor in the transactions here involved, petitioner failed to meet the burden of proving either that Morton misrepresented any material existing

fact or that he breached any alleged promise made to petitioner. (See our analysis of proof at trial, page 5, *supra.*)

Petitioner states at page 23 of his brief that the "Findings of Fact clearly show a breach of the contract pursuant to which the note was executed—" but fails to point out the particulars of such findings. Possibly petitioner is referring to that statement in the trial court's findings of fact, viz., "Vest at no time authorized or agreed to the change in the collateral security pledged upon the $10,000 note and its renewals" (T. 158). Reading the sentence just quoted in the light of the court's prior finding that petitioner "was aware that Morton had reserved the right to change the collateral from time to time" (T. 157) it is in reality a conclusion of law (and contrary to petitioner's own testimony T. 80) rather than a finding of fact, because there is no proof or even inference that petitioner objected to Morton's reserved "right to change the collateral." If the court's statement concerning the absence of authority from petitioner to change the collateral is to be considered as a finding of fact then it is immaterial because there is no finding (and no proof to support one) that Morton agreed to maintain the same collateral or even collateral of equal value, throughout the existence of petitioner's renewals.

Assuming further for the present purposes that in these circumstances respondent as receiver stands in no better position than the bank, as petitioner contends was held in *Rankin* v. *City National Bank*, 208 U. S. 545, and *Deitrick* v. *Standard Casualty & Surety Company*, 303 U. S. 471, the subject bank, were it now an operating institution, would be entitled to recover here, because, as petitioner argues, he was clearly liable on the original note and, as has been pointed out (*supra*, p. 5), he has failed to meet the burden of proving the elements of any of the affirmative defenses interposed to this action on the renewal.

CIRCUIT COURT OF APPEALS DECISION DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS NOR OF THIS COURT.

Petitioner does not specifically urge in his petition as a reason for granting a writ of certiorari that the decision of the Circuit Court of Appeals below is in conflict with the decisions of other circuit courts of appeal, but he contends at page 23 of his supporting brief that such a conflict does exist. We think it has been clearly demonstrated that there has been no proof below of either (1) a contract (agency or otherwise), concerning the pledging or maintenance of $12,000 or more in collateral, pursuant to which petitioner alleges the last renewal was executed or (2) the breach of any promise or agreement related to the last or any prior renewal note.

Contracts as between the complaining parties and the sole actors as well as breaches of such contracts were not only alleged but also proven in the cases of *Curtis, Collins & Holbrook Co.* v. *U. S.*, 262 U. S. 215; *Skud* v. *Tillinghast* (C. C. A. 6th), 195 Fed. 5; *Munroe* v. *Harriman National* Bank (C. C. A. 2d), 85 F. (2d) 493, cert. denied 299 U. S. 601. In *Connecticut Fire Insurance Co.* v. *Commercial National Bank* (C. C. A. 5th), 87 F. (2d) 968, the bank sought to retain the stolen bonds which it had purchased through its "sole actor" agent but here the bank has never received (T. 221) and is not seeking to retain any benefits of the collateral allegedly converted. While the "sole actor" rule was involved in the case of *Maryland Casualty Co.* v. *Queenan* (C. C. A. 10th), 89 F. (2d) 155, the real issue there was between the bank and the surety on the "sole actor's" fidelity bond as an officer of the bank, whereas the issue here is between the two principals who were both represented by the same "sole actor" agent.

The principal fallacy underlying the argument under petitioner's last point, viz., that the decision below may conflict with the decision of this Court in *Deitrick* v. *Standard Surety & Casualty Co., supra,* lies in the unfounded assumption that recovery could not be had by the bank in the case at bar. The Standard Surety & Casualty Company defended on the grounds that the bonds there sued upon were executed by its agent not only without authority but also without consideration, and that the bank was charged with knowledge of these facts. The surety company met the burden of proving its defenses, whereas petitioner here has failed to do so,[3] and the defense of no consideration does not lie in an action by the payee against the maker of an accommodation note. See *Citizens National Bank of Glasgow* v. *Damron,* 286 Ky. 43, 149 S. W. (2) 761.

Conclusion.

For all of which it is respectfully submitted that the decision of the Circuit Court of Appeals is correct, that there is no conflict of decisions, that no question of statutory construction nor of public importance is here presented and that the petition for a writ of certiorari should be denied.

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[3] See, *supra,* p. 5.

I hereby authorize the filing of the foregoing brief.

Charles Fahy
Solicitor General